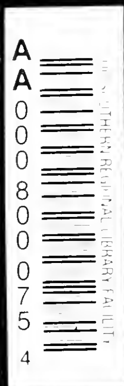

THE STUDENT'S GUIDE TO THE SUPREME COURT OF JUDICATURE ACTS

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THE
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1873 & 1875;
BEING A SERIES OF
QUESTIONS AND ANSWERS THEREON.

BY
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SOLICITOR,
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AUTHOR OF "AN EPITOME OF LEADING COMMON LAW CASES," "AN EPITOME OF LEADING CONVEYANCING AND EQUITY CASES," AND "SELF-PREPARATION FOR THE FINAL EXAMINATION."

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PREFACE.

The object of the present work is to lay before the Student in the easiest form the contents of the Judicature Acts and Rules, and it is hoped that it may be found useful, not only for the purpose of examination, but to any one desiring a first knowledge of the new system. No attempt has been made by the Author to blend the previous and the new practice, as he did not consider that any good could result from attempting to do so at the present time, and it would seem that for some considerable period the study of the new practice will not relieve Students from the study of the old.

The Author has endeavoured in the following pages, as far as possible, to place the provisions of the Acts and Rules on the same subjects together, and thus do away with the difficulty that arises in reading the Acts and Rules themselves, of finding one provision relating to a particular matter in one place, and another altogether elsewhere. Provisions as to Probate, Divorce, and Admiralty are purposely omitted, and also various other

matters in both the Act and Rules which have been considered only important for reference in practice, &c.

In conclusion the Author trusts that the present Guide may be found to many a useful method of acquiring the now necessary knowledge of the Judicature Acts and Rules.

J. I.

22, Chancery Lane, London,
September, 1875.

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THE

STUDENT'S GUIDE

TO THE

SUPREME COURT OF JUDICATURE ACTS,

1873 AND 1875.

PART I.

OF THE GENERAL SCOPE OF THE ACTS AND THE CONSTITUTION OF THE SUPREME COURT OF JUDICATURE.

Q. **What led to the passing of the Judicature Act, 1873?**

A. The fact of the existence of two distinct tribunals of Law and Equity respectively, which, however well accounted for by reference to their early histories, could not but be considered somewhat of an anomaly at the present day. The Act adopts the principal proposals contained in the Report of the Judicature Commissioners.

Q. **Give a short statement of the objects of the Act.**

A. The great and chief object is to do away with separate Courts for different matters, and to effect a fusion of them, that the anomaly above mentioned shall exist no longer; that no suitor shall run further risk

of coming to a wrong Court; and also, as far as possible, to fuse the two systems of Law and Equity. Another object of the Act is to constitute a new mode of appeal, and generally to make provision for a more speedy and efficient remedy in all cases.

Q. **State shortly how these objects are carried out.**

A. The existing Courts are fused into one Supreme Court, to consist of two parts, the one having original, and the other appellate jurisdiction. In the first, however, there are Divisions nearly synonymous with the previously existing Courts, but provision is made for the transfer of any matter commenced in one of such Divisions to another, so that no injustice can occur by the wrong Division having been resorted to. The object of fusion of Law and Equity is carried out by various enactments throughout the Act, and particularly by certain rules of law therein provided, and as an instance of the carrying out the last of the objects mentioned in the foregoing answer may be mentioned the provisions for appointment of referees and assessors, the establishment of district registries, and the alteration in various respects by the Rules of Procedure of the previous course of process.

Q. **When do the Judicature Acts come into operation?**

A. The original Act was to have come into operation on the 2nd of November, 1874, except certain provisions which are declared to take effect on the passing of the Act (sect. 2), but its operation was postponed by an Act

37 & 38 Vict. c. 83. The Acts now come into operation on 1st November, 1875, except the provisions abolishing final appeal to the House of Lords, which by the Act of 1875, sect. 2, are not to come into operation until a year later, viz. 1st of November, 1876.

Q. **How is the Supreme Court of Judicature constituted?**

A. By the unison and consolidation together of the following previously existing Courts, viz.: (1), the Court of Chancery; (2), the Court of Queen's Bench; (3), the Court of Common Pleas; (4), the Court of Exchequer; (5), the Court of Admiralty; (6), the Court of Probate; and, (7), the Divorce Court. (Jud. Act, 1873, sect. 3, amended by Jud. Act, 1875, sect. 9.)

Q. **How is the Supreme Court divided?**

A. Into two permanent divisions, viz., "Her Majesty's High Court of Justice" for original jurisdiction and certain appellate jurisdiction from inferior Courts, and "Her Majesty's Court of Appeal" for appellate jurisdiction. (Jud. Act, 1873, sect. 4.)

Q. **Who are qualified to be judges of the Supreme Court?**

A. Any barrister of not less than ten years' standing may be appointed a judge of the High Court of Justice, and any person who before the Act might have been appointed a Lord Justice of Appeal in Chancery, or any person who has been a judge of the High Court of Justice for not less than one year, may be appointed an ordinary judge of the Court of Appeal. No person to be henceforth appointed a

judge of either of the said Courts is to be required to take the degree of serjeant-at-law as formerly. (Jud. Act, 1873, sect. 8.)

Q. **What is the position of a judge of the Supreme Court?**

A. He holds his office for life, subject to a power of removal by Her Majesty on an address presented to Her Majesty by both Houses of Parliament. On appointment he takes the oaths as heretofore, and he is incapable of sitting in the House of Commons. (Jud. Act, 1875, sect. 5.)

Q. **Is the Court of Bankruptcy united in the Supreme Court?**

A. No; the provision to that effect in the Act of 1873 is repealed by the Act of 1875, which provides (sect. 9) that it shall not be so united, but shall continue in all respects as if the first Act had not made such transfer. The office of Chief Judge in Bankruptcy is to be filled by one of the judges of the High Court of Justice, so that the existing practice in this respect, under which a Vice-Chancellor is also Chief Judge in Bankruptcy, is continued.

Q. **How many sittings of the Supreme Court are there to be in every year?**

A. The sittings of the Court of Appeal, or in London or Middlesex of the High Court of Justice, are to be four every year, viz.:—

1. The Michaelmas sittings, to commence 2nd November and end 21st December.
2. The Hilary sittings, to commence 11th January and end on the Wednesday before Easter.

3. The Easter sittings, to commence on the Tuesday after Easter week and end on the Friday before Whit Sunday; and,
4. The Trinity sittings, to commence on the Tuesday after Whitsun week and terminate on the 8th August. (Order 61.)

PART II.

OF THE CONSTITUTION OF "HER MAJESTY'S HIGH COURT OF JUSTICE," AND OF THE SITTINGS AND THE DISTRIBUTION OF BUSINESS THEREIN; AND OF THE DISTRICT REGISTRIES.

Q. **How is that Division of the Supreme Court of Judicature called Her Majesty's High Court of Justice constituted?**

A. Its first judges are to be the existing ones of the Courts constituting the Supreme Court, except such (if any) as may be appointed ordinary judges of the Court of Appeal, and when any vacancy occurs a new judge is to be appointed by letters patent. All persons appointed to fill the place of the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, or the Lord Chief Baron, are to have the same titles and precedence and be appointed in the same way as heretofore, and any person appointed to fill the place of any other judge is to be styled "Judge of Her Majesty's High Court of Justice." The Lord Chief Justice of

England is to be president of the Court in the absence of the Lord Chancellor (Jud. Act, 1873, sect. 5). This section also provided that the permanent number of the judges was not to exceed twenty-one, but this part of the section is repealed by sect. 3 of the Act of 1875.

Q. **How is the High Court of Justice divided?**

A. As it is, as stated in the previous answer, composed of the different judges of pre-existing Courts, so it is divided in accordance with those Courts over which the judges previously presided, or nearly so. There are five Divisions, viz.: (1), the Chancery Division, composed of Chancery judges; (2), the Queen's Bench Division, composed of the judges of the Court of Queen's Bench; (3), the Common Pleas Division, composed of the judges of the Court of Common Pleas; (4), the Exchequer Division, composed of the judges of the Court of Exchequer; and (5), the Probate, Divorce, and Admiralty Division, composed of the judges of these Courts respectively. (Jud. Act, 1873, sect. 31.)

Q. **Who presides over each of these Divisions?**

A. The judge who was chief of the formerly existing Courts is now to be president of each Division, *i.e.*, Of Division 1 the Lord Chancellor; 2, the Lord Chief Justice of England; 3, the Lord Chief Justice of the Court of Common Pleas; 4, the Lord Chief Justice of the Exchequer. Of the 5th Division the existing judge of the Court of Probate is to be president, and subject thereto the senior judge of the said Division. (Jud. Act, 1873, sect. 31.)

Q. **Are the judges capable only of sitting in their respective Divisions?**

A. No; the division is not to prevent any judge from sitting when required in any divisional Court, and any judge may be transferred from one Division to another by Her Majesty under her royal sign manual. (Jud. Act, 1873, sect. 31).

Q. **Are these Divisions subject to alteration?**

A. Either they or the judges thereof may be reduced or increased by order of Her Majesty in Council upon recommendation of the Council of Judges of the Supreme Court; such order has first to be laid before each House of Parliament for thirty days before coming into operation. (Jud. Act, 1873, sect. 32).

Q. **What jurisdiction is vested in the High Court of Justice?**

A. As the various formerly existing Courts, except the Court of Bankruptcy, are consolidated into one (see *ante*, p. 10), it follows that the High Court of Justice should have vested in it all their original jurisdiction, which is, indeed, specially provided, and also the jurisdiction of the Court of Common Pleas at Lancaster, the Court of Pleas at Durham, and the Courts created by Commissions of Assize, Oyer and Terminer, and of Gaol Delivery, and this is to include the jurisdiction vested in the judges of the said Court sitting in Court or chambers, or elsewhere, in pursuance of any statute, law, or custom (Jud. Act. 1873, sect. 16). But it is specially provided that there shall *not* be transferred to the said Court: (1), the jurisdiction of

the Court of Appeal in Chancery, or of the same Court in bankruptcy; (2), the jurisdiction of the Court of Appeal in Chancery of the county palatine of Lancaster; (3), the lunacy jurisdiction formerly vested in the Lord Chancellor and Lords Justices; (4), the jurisdiction vested in the Lord Chancellor in relation to grants of letters patent; or, (5), as visitor of any college; and (6), any jurisdiction of the Master of the Rolls in relation to records. (Jud. Act, 1873, sect. 17.)

Q. **What provisions are made as to business pending at the date of the commencement of the Acts?**

A. It is enacted that any judgment, decree, or order made, but not completed, may be completed as if the Acts had not passed, and take effect as if perfected before the commencement of their operation. Every judgment, decree, or order previously perfected may be executed, enforced, amended, or discharged by the said High Court of Justice and the Court of Appeal respectively in the same way as if it had been a judgment of the said High Court or of the said Court of Appeal, and that with respect to all matters pending at the commencement of the Acts they are to be continued before the Court of Appeal if in the nature of appeals, and if not, before the said High Court, and the said Courts are to have the like jurisdictions as if the same had been commenced there. (Jud. Act, 1873, sect. 22.)

Q. **What rules are to be observed by the Courts in exercising their jurisdiction?**

A. The same is to be exercised as provided by the Act

and the Rules and Orders, and where no special provision is made, then as nearly in the same manner as it might have been exercised by the Courts from which the jurisdiction was transferred. (Jud. Act, 1873, sect. 23.)

Q. What provision is contained in the Act as to terms?

A. So far as relates to the administration of justice terms are abolished, and are not to be applicable to any sitting or business of the Court, but the Courts and judges thereof are to have power to sit and act at any time and at any place. But in all other cases in which the division of terms is used as a measure for determining the time within which any act is to be done they are to continue until provision is made to the contrary. (Jud. Act, 1873, sect. 26.)

Q. What vacations are to exist?

A. In pursuance of sects. 27 and 28 of the Judicature Act, 1873, by the Rules, Order 61, the vacations are to be four: the Long, Christmas, Easter, and Whitsun. The Long Vacation is to be as heretofore, but two of the judges are to sit during it in London or Middlesex, for the hearing of urgent applications; and the several offices of the Supreme Court are to be open every day of the year except Sundays, Good Friday, Monday, and Tuesday in Easter week, Whit Monday, Christmas Day, and the next following working day, and public fast days.

Q. What provision is made with regard to the circuits of the judges?

A. Her Majesty may appoint any judges of the High

Court, or other persons usually named in commissions of assize, who are to have full powers and to be deemed to constitute a Court of the said High Court of Justice (Jud. Act, 1873, sect. 29). Subject to arrangements between the judges of the High Court the sittings shall be held by or before a judge of the Queen's Bench, Common Pleas, or Exchequer Division of the said High Court, but any ordinary judge of the Court of Appeal, or Chancery Division, or serjeant-at-law, or Queen's counsel, may be appointed. (Jud. Act, 1873, sect. 37.)

The Act of 1875 (sect 23), also enacts that Her Majesty may by Order in Council provide for the discontinuance of any circuit, or for appointment of the places for assizes to be held at, or for altering the day appointed for holding assizes.

Q. At what periods are sittings to be held in London and Middlesex?

A. Subject to Rules of Court and vacations, and as far as practicable, they are to be held continuously, and by as many judges as the business may render necessary. Any judge so sitting is to be deemed to constitute a Court of the said High Court of Justice. (Jud. Act, 1873, sect. 30.)

Q. Before which of the judges are such sittings to be held?

A. As on circuit, so these sittings are to be held by or before judges of the Queen's Bench, Common Pleas, or Exchequer Divisions of the said High Court. (Jud. Act, 1873, sect. 37.)

Q. **In what way is the business of the High Court to be distributed over its different Divisions?**

A. As provided by Rules of Court, but subject thereto, generally the same matters as would have before been within the exclusive or peculiar jurisdiction of each different Court are now to be within the exclusive and peculiar jurisdiction of the corresponding Division. By the original Act the jurisdiction in bankruptcy was transferred to the Exchequer Division, but this part of the section is repealed, the Court of Bankruptcy being by the 1875 Act, as stated in a previous answer (see *ante*, p. 12), kept distinct from the Supreme Court. The Chancery Division is not to have the jurisdiction in appeals from County Courts that the Court of Chancery had (see as to County Court Appeals, *post*, p. 23). Causes and matters pending at commencement of the Act in each Court are to be continued in the corresponding Division, and those then pending in the Court of Common Pleas at Lancaster and the Court of Pleas at Durham are to be continued in the Common Pleas Division. (Jud. Act, 1873, sect. 34.)

Subject as before stated, and to any Rules of Court, it is in the option of the plaintiff to choose in what Division he will sue by marking the document commencing the action with the name of the Division, and all subsequent proceedings are to be taken in the Division to which the cause is temporarily attached. (Jud. Act, 1875, sect. 11.)

Q. Is the plaintiff allowed an absolute choice of which Division he will commence his action in?

A. Primarily he is, but if he commence it in a Division to which, according to the provisions of the Act or the Rules of the Court, it ought not to be assigned, the Court may on summary application transfer it to the proper Division, or retain the same in the Division in which it commenced; and a cause is not to be commenced in the Probate, Divorce, and Admiralty Division unless formerly it would have been commenced in one of those Courts. (Jud. Act, 1875, sect. 11.)

The Act of 1873 (sect. 36), also provides that the Court may transfer causes from one Division to another without any application being made (sect. 36).

Q. What is the result of a plaintiff assigning his cause to a wrong Division?

A. As stated in the previous answer it may be transferred or retained, and it is provided that all steps taken in such wrong Division before transfer shall be nevertheless as valid and effectual as if made in the proper Division. (Jud. Act, 1875, sect. 11.)

Q. In what way is it that the Act does away with the possibility that existed under the previous system of seeking a remedy in the wrong Court?

A. Practically, in modern times the risk of going to a Court of Law when relief should have been sought in Equity, and *vice versâ*, was *very* slight. However, it is quite done away with by the provisions of the Acts, as before stated, enabling the Court to summarily transfer

the cause to the proper Division, and giving effect to all previous steps, or retaining the same in the Division where commenced if the Court shall think fit.

Q. **Before whom are election petitions to be tried?**

A. The judges who at the commencement of the Act are on the rota for trial of these petitions are to so continue until the end of the year, and afterwards they are to be selected out of the judges of the Queen's Bench, Common Pleas, and Exchequer Divisions, as may be provided by Rules of Court; and, subject to such Rules, they are to be selected from the judges of those Divisions as if such Divisions had been named instead of the Courts of Queen's Bench, Common Pleas, and Exchequer respectively in the "Parliamentary Elections Act, 1868." (Jud. Act, 1873, sect. 38.)

Q. **Who is to have jurisdiction in respect of lunatics?**

A. The jurisdiction formerly vested in the Lords Justices of Appeal in respect of lunatics is to be exercised by such judge or judges of the High Court, or Court of Appeal, as may be intrusted by the sign manual of the sovereign with the care and commitment of the custody of such persons and estates. (Jud. Act, 1875, sect. 7.)

Q. **Before how many judges, or in what way, are causes and matters in the High Court to be heard?**

A Where formerly a single judge would have had jurisdiction either in Court or Chambers, any one judge of the High Court is now to have jurisdiction, and to be deemed to constitute a Court; and it is particularly provided that in the Chancery, and the Probate, Divorce,

and Admiralty Divisions, causes and matters shall, in the first instance, be disposed of by one judge only, as heretofore accustomed in those Courts respectively; and causes and matters not proper to be heard by a single judge are to be disposed of before a Divisional Court. (Jud. Act, 1873, sects. 39, 40, 42.)

Q. How many judges are to constitute a Divisional Court?

A. Two, or three, and no more; when possible three. Any number of Divisional Courts may sit at the same time. (Jud. Act, 1873, sect. 40.)

Q. How is business that would formerly have come before the Courts of Common Law in banc to be disposed of?

A. By Divisional Courts, which are to include, as far as practicable, one or more judge or judges attached to the particular Division to which the cause or matter out of which such business arises has been assigned. (Jud. Act, 1873, sect. 41.)

Q. What matters are to be heard before the Divisional Courts?

A. (1.) All causes and matters not proper to be heard by a single judge. (Jud. Act, 1873, sect 40.)

(2.) All matters that would formerly have come before the Courts of Common Law sitting in banc. (Jud. Act, 1873, sect. 41.)

(3.) In the Chancery, and the Probate, Divorce, and Admiralty Divisions, all causes and matters which the judge to whom the business is assigned, with the concurrence of the President of the Division, deems proper

to be heard by a Divisional Court. (Jud. Act, 1873, sects. 43 and 44.)

(4.) Appeals from Petty or Quarter Sessions, or from a County Court or other inferior Court; and the determination on such appeals to such Divisional Courts is to be final, unless special leave to appeal is given by the Divisional Court hearing the appeal. (Jud. Act, 1873, sect. 45.)

(5.) Cases or points reserved by any judge of the High Court. (Jud. Act, 1873, sect. 46.)

Q. What provision is made by the Act for the determination of Crown Cases reserved?

A. They are to be determined by the judges of the High Court, or five of them at least, which are to include the chiefs of the Common Law Divisions, or one of them; the decision of such judges is to be final.

Q. To where are appeals from County Court decisions to be made?

A. To a Divisional Court of the High Court of Justice, consisting of such judges thereof as may from time to time be assigned for that purpose pursuant to Rules of Court, and the determination of such appeals by such Divisional Court is to be final, unless special leave to go to the Court of Appeal shall be given by such Divisional Court. (Jud. Act, 1873, sect. 45.)

Q. If any point arises in the course of a trial, what course may the judge take?

A. He may reserve the same for the consideration of, or direct any case to be argued before, a Divisional Court

(Jud. Act, 1873, sect. 46); but the Jud. Act, 1875 (sect. 22), by way of explanation of this provision, enacts that it is not to prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury.

Q. **State briefly the provision made for the establishment of district registries.**

A. By the Jud. Act, 1873, sect. 60, amended by the Jud. Act, 1875, sect. 13, it is provided that district registries may be established throughout the country in order to facilitate the prosecution of actions in country districts.

By a recent Order of Her Majesty in Council various places throughout the kingdom have been appointed in which there are to be district registries, and for the main part the County Court registrars are to be the district registrars.

Q, **What is to be the extent of the jurisdiction exercised in these district registries?**

A. Actions may be commenced and continued down to entry for trial, or (if the Plaintiff is entitled to sign final judgment, or obtain an order for an account by reason of the non-appearance of the defendant) down to final judgment, or an order for an account. Any action commenced in the district registry is, however, subject, on the application of any party, at the discretion of a judge of the High Court, to be removed from there. (Jud. Act, 1873, sects. 64 and 65.)

PART III.

OF THE CONSTITUTION OF "HER MAJESTY'S COURT OF APPEAL," AND ITS JURISDICTION.

Q. **How is that Division of the Supreme Court of Judicature called "Her Majesty's Court of Appeal" constituted?**

A. It is constituted by five *ex-officio* judges and ordinary judges to be appointed by Her Majesty, not exceeding three at any one time, and also the Lord Chancellor may request the attendance of an additional judge from either the Queen's Bench, Common Pleas, Exchequer, or Probate, Divorce, and Admiralty Divisions, except during the time of the Spring or Summer circuits. (Jud. Act, 1875, sect 4, instead of sect. 6 in 1873 Act, repealed.)

Q. **Who are to be the ex-officio judges of this Court?**

A. (1.) The Lord Chancellor;

(2.) The Lord Chief Justice of England;

(3.) The Master of the Rolls;

(4.) The Lord Chief Justice of the Common Pleas; and

(5.) The Lord Chief Baron of the Exchequer. (Jud. Act, 1875, sect. 4.)

Q. **Who are to be the first ordinary judges of this Court?**

A. The two present Lord Justices of Appeal in Chan-

cery, and one other person to be appointed by Her Majesty by letters patent. (Jud. Act, 1875, sect. 4.)

Q. What is to be the nature of the tenure of the judges?

A. Except the Lord Chancellor, during good behaviour, subject to removal by Her Majesty on an address by both Houses of Parliament, and they cannot sit in the House of Commons.

Q. In what order of precedence are the judges of this Court to rank?

A. The Lord Chancellor is to be president, the other *ex-officio* judges to retain their present order, and the ordinary judges according to the priority of their appointments. (Jud. Act, 1875, sect. 6.)

Q. What jurisdiction is transferred to the Court of Appeal?

A. All the jurisdiction and powers formerly vested in all or any of the following Courts, or persons:—

(1.) In the Lord Chancellor and Court of Appeal in Chancery, in the exercise of his and its appellate jurisdiction, and also as a Court of Bankruptcy Appeal.

(2.) In the Court of Appeal in Chancery of the county palatine of Lancaster, or of the Chancellor of the duchy and said county palatine.

(3.) In the Court of the Lord Warden of the Stannaries, or in the Lord Warden sitting in his capacity of judge.

(4.) In the Court of Exchequer Chamber.

(5.) In Her Majesty in Council or the Judicial Committee of the Privy Council, upon appeal from any judgment or order of the High Court of Admiralty, or from any order in lunacy. (Jud. Act, 1873, sect. 18.)

Q. **To what Court are all appeals from the High Court of Justice to be made?**

A. To "Her Majesty's Court of Appeal." (Jud. Act, 1873, sect. 19.)

Q. **What is the present position of the appellate jurisdiction of the House of Lords?**

A. The provision of the Judicature Act, 1873 (sect. 20), is to the effect that save as regards pending writs of error or appeal, or the right to bring error or appeal from any prior judgment or order, such jurisdiction be abolished. But by sect. 2 of the Act of 1875, the operation of this section is postponed until the 1st November, 1876, and until then appeals may be brought to the House of Lords from orders of the Court of Appeal.

Q. **What is the present position of the jurisdiction of the Judicial Committee of Her Majesty's Privy Council?**

A. Like the appellate jurisdiction of the House of Lords it is abolished by the same section of the Jud. Act, 1873, but the operation of the enactment is likewise postponed till the 1st November, 1876, by sect. 2 of the Act of 1875.

PART IV.

Of Certain Rules of Law.

Q. What is the new rule introduced as to the administration of assets of insolvent estates of deceased testators or intestates, and in the winding-up of companies whose assets are insufficient?

A. It is provided that the same rules shall prevail as to the respective rights of all secured and unsecured creditors, and as to all debts and liabilities, and the valuation of annuities and future and contingent liabilities, as may be in force for the time being under the Law of Bankruptcy, in respect of bankrupts' estates. (Jud. Act, 1875, sect. 10, instead of Jud. Act, 1873, sect. 25, sub-sect. 1, repealed.)

The main consequences of this enactment seem to be that all unsecured debts will rank *pari passu,* and a registered judgment will be entitled to no priority. A secured creditor must value his security, and prove for the deficiency, as specified in the Bankruptcy Act, 1869, and if his security realise more than he estimated it at, must give up the surplus for the benefit of the estate, and if less than he estimated it at, cannot prove for the deficiency. (It is very possible that numerous doubts may arise on this enactment, and for a fuller consideration thereof the student is referred to Griffith's Jud. Act, pp. 32-35.)

Q. Are the Statutes of Limitation to apply to express trusts?

A. No, they are not; nor to any claim in respect of any

breach of such trust. (Jud. Act, 1873, sect 25 (2).) This is simply the principle which has always prevailed in Equity.

Q. **What provision is made by the Jud. Act, 1873, as to equitable waste?**

A. That a tenant for life without impeachment of waste shall have no legal right to commit equitable waste unless an intention to that effect shall expressly appear by the instrument creating such estate. (Jud. Act, 1873, sect. 25 (3).)

Q. **Explain the object and effect of the foregoing provision.**

A. It is a provision arising naturally from the nominal union (which it is the object of the Act to effect), of the Courts of Law and Equity. Equitable waste was only recognisable and relievable against in Equity, whilst Law suffered it with impunity, and while all the Courts are fused into one High Court of Justice, it would be an anomaly to let there be a remedy in the Equitable Division but not in the other Divisions. Therefore the object of the provision is to establish uniformity in the matter in all the Divisions, and the effect to give a remedy for "equitable waste" in all the Courts.

It may be noticed that the Act makes no provision for the case of equitable waste in the case of a tenant in fee simple, with an executory devise over, who is, in the same way as a tenant for life without impeachment of waste, prohibited from committing equitable waste. (See Indermaur's Eq. and Conv. Cases, 2nd Ed., p. 4.)

Q. State the provision in the Jud. Act, 1873, as to merger, and explain it.

A. It is provided that there shall not be any merger by operation of law only of any estate the beneficial interest in which would not be deemed merged or extinguished in Equity (sect. 25 (4).) It is explained by referring to the object stated in the previous answer; for whereas formerly an interest might be merged at Law, but yet kept alive in Equity, now that the Courts are united the same law is to be observed in all the Divisions.

Q. Can a person after he has mortgaged land bring an action of ejectment against some person (other than the mortgagee) who has wrongfully acquired possession, for its recovery?

A. Having by his mortgage parted with his actual legal interest, he could not formerly have done so, though, of course, he was in Equity beneficially entitled after payment of the mortgage money, the mortgage being there merely looked upon as a security for the money. It is, however, now provided that until the mortgagee has given notice of his intention to take possession, or to enter into receipt of the rents and profits, the mortgagor may sue to recover possession, or in respect of any trespass or other wrong, in his own name only, unless, indeed, the cause of action arises upon a lease or other contract made by him jointly with any other person. (Jud. Act, 1873, sect. 25 (5).)

Q. Can a chose in action be legally assigned so as to enable the assignee to sue in his own name?

A. Formerly it could not, except in a few cases, such as

bills of exchange by the custom of merchants, life policies by stat. 30 & 31 Vict. c. 144, and marine policies by 31 & 32 Vict. c. 86; but it is now provided by the Act that all choses in action shall be legally assignable by way of absolute assignment, *express notice in writing* being given to the debtor, trustee, or other person from whom the assignee would have been entitled to claim. (Jud. Act, 1873, sect. 25 (6).)

Q. **If a debt or other chose in action is absolutely assigned, and express notice is given as provided by the Act, but the assignment is afterwards disputed, what course should the holder of the debt or other chose take?**

A. He may call upon the parties to interplead, or pay the same into the High Court of Justice, under the provisions of the Act for relief of trustees. (Jud. Act, 1873, sect. 25 (6).)

Q. **A contract for sale of property contains a provision that it shall be completed by a certain date. If it is not so completed through the fault of one of the parties, is the other entitled to rescind the contract?**

A. At Law he would have been, but not in Equity, unless it was expressly stipulated that time was of the essence of the contract, or unless it was so from the nature of the property, as on the sale of a life interest or other uncertain interest. The Common Law rule is now by the Act done away with, and such a contract as specified in the question is to receive the same construction as it before would have in Equity. (Jud. Act, 1873, sect. 25 (7).)

This provision again, as mentioned with regard to that relating to equitable waste, simply results from the nominal fusion of the Courts of Law and Equity into one.

Q. In what cases will the High Court appoint a receiver?

Q. In the same cases as heretofore (see Hallilay's Digest, 7th ed. p. 381), and in addition, in all cases in which it shall appear to the Court to be just or convenient. (Jud. Act, 1873, sect. 25 (8).)

Q. What provision is contained in the Act as to the granting of injunctions?

A. The widest possible power is given to the Court to grant injunctions, either conditionally or unconditionally, and that whether the estates claimed by both or either of the parties are legal or equitable. (Jud. Act, 1873, sect. 25 (8).)

Q. Can all the Divisions of the High Court decree specific performance of a contract?

A. This may, perhaps, be considered doubtful. Formerly, practically, the jurisdiction of the Court of Equity to do so was exclusive, for under the power given to the Courts of Common Law by the Common Law Procedure Act, 1854, sect. 68, it was decided they could only decree specific performance of contracts comprising a public duty. (*Benson* v. *Paull*, 27 L T. Rep. 78.) The Jud. Act, 1873, sect. 25 (8), now provides generally that a mandamus may be granted by *the Court*, which would seem to include all its Divisions.

Q. What is meant by the doctrine of contributory negligence?

A. By it is meant that if a plaintiff has by his own act

contributed to the injury done him he is not entitled to recover.

Q. **Does the doctrine of contributory negligence apply to collisions at sea?**

A. No, being a Common Law rule; and on this point it is expressly provided by the Jud. Act, 1873, sect. 25 (9), that "the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail."

Q. **What is the Admiralty rule as to collisions?**

A. That where there is fault in both ships; the injury to both is estimated and divided between them. (Griffith's Jud. Acts, pp. 41, 42.)

Q. **Are the rules of Law or Equity to prevail as to custody and education of infants?**

A. The rules of Equity. (Jud. Act, 1873, sect. 25 (10)).

Q. **If in any matter arising in the Supreme Court there is a variance between the rules of Law and Equity, which are to prevail?**

A. It is enacted that in any such case of variance or conflict the rule of Equity shall prevail (Jud. Act, 1873, sect. 25 (11)). So that, for instance, in the case of contribution between sureties, in which at Law it has been with reference to the number originally liable, but in Equity with reference to the number liable at the time of contribution being sought—(see Indermaur's Eq. and Conv. Cases, 2nd ed. p. 40)—it will now always be as in Equity (*a*).

(*a*) For further information and consideration of the rules of Law contained in the Jud. Act, 1873, sect. 25, the student is referred to Mr. Downes Griffith's work on the Jud. Acts, pp. 32-42.

PART V.

Of Procedure generally.

1. *The Action and Writ of Summons to Service.*

Q. **How are proceedings in the High Court of Justice to be instituted?**

A. All future actions at Law or suits in Equity are to be instituted by a proceeding to be called an action. (Order 1, r. 1.)

Q. **How are such actions to be commenced?**

A. By a writ of summons (which by Order 6, r. 5, may be written or printed, or partly written, and partly printed), specifying the Division of the High Court to which it is intended that the action should be assigned, and indorsed with particulars of the plaintiff's claim; various forms of writs are given in an Appendix to the Rules; and it is not essential for the indorsement to set forth the precise claim, and the Court may at any time amend or extend it. If the writ or indorsement is unnecessarily prolix, the extra costs thereof are to be borne by the party using it, unless the Court shall otherwise direct. (Orders 2 and 3.)

Q. **Can such writ of summons be served out of the jurisdiction?**

A. Yes, by leave of the Court or a judge; and a form

of such writ (to be varied as necessary) is given in the Appendix to the Rules. (Order 2, rr. 4, 5.)

Q. Can a writ still be issued under the Bills of Exchange Act, 18 & 19 Vict. c. 67?

A. Yes, as heretofore. (Order 2, r. 6.)

Q. How are all writs to be tested?

A. In the name of the Lord Chancellor; or if that office is vacant, in the name of the Lord Chief Justice of England. (Order 2, r. 8.)

Q. What provision is made for specially indorsing a writ, and what is the advantage of so doing?

A. A writ may be specially indorsed where the plaintiff sues for a liquidated demand; and in such case the amount of debt and costs is to be stated, and a notice indorsed that upon payment within four days further proceedings will be stayed (Order 3, rr. 6, 7). The advantage of the special indorsement is that the plaintiff may, upon an affidavit verifying the cause of action, and that he believes there is no defence, call on the defendant to shew why he should not have judgment; and unless defendant offers to pay the amount into Court, or satisfies the judge that he has a good defence, the judge may empower the plaintiff to at once sign judgment. Leave to defend may be given unconditionally, or on terms as to security or otherwise, and if a defence set up applies only to part of the claim the plaintiff may have judgment forthwith as to the rest. (Order 3, rr. 6 and 7, and Order 14.)

Q. **If the plaintiff in any action desires an account, e.g., in an action by a "cestui que trust" against his trustee, what peculiarity is there in the procedure?**

A. The writ may be indorsed with a claim for the account, and if the defendant does not appear, or appearing fails to satisfy the Court or judge that there is some preliminary question to be tried, an order for the account, with all usual directions, may be made forthwith. (Order 3, r. 8, and Order 15.)

Q. **What indorsement are writs to have?**

A. As before stated, an indorsement of claim must be made, and the additional special indorsement may be made, if a fixed liquidated sum is sued for; the name and address of the solicitor issuing the writ must also be indorsed, and if he is an agent, then the two names, and if the plaintiff sues in person, then his name and address. If the writ is issued in London, or in a district registry, with the option to the defendant of entering an appearance there or in London, and if the address of the plaintiff's solicitor, or the plaintiff suing in person, is more than three miles from Temple Bar, an address for service must be given within that distance. If the writ is issued in a district registry without the said option, it is sufficient for the plaintiff's solicitor to give his place of business within the district, or for the plaintiff suing in person to give an address within the district (Order 4). The person serving the writ must indorse on it the day of the month and week of service within three days after, otherwise the

plaintiff cannot proceed by default in the case of non-appearance. (Order 9, r. 13.)

Q. With reference to the district registries (see ante, p. 24), can any action commenced there be removed to London?

A. Yes; it is liable to such removal on the application of any party at the discretion of the judge. (Jud. Act, 1873, sect. 65.)

Q. Is such removal always at the discretion of the Judge of the High Court to whom the application is made?

A. Yes; except in the following cases, when it is of right:

(1.) Where the writ is specially indorsed, and the plaintiff does not within four days after appearance give notice of an application for leave to sign judgment.

(2.) Where plaintiff has made such application, and the defendant has obtained leave to defend.

(3.) Where the writ is not specially indorsed.

But in each of the above three cases the removal must be before delivering a defence, and before the expiration of the time for doing so. (Order 35, r. 11.)

Q. Can the plaintiff at his option issue a writ from London or from the registry of any district?

A. Yes (except in probate cases, in which the writ cannot be issued from the district registry), but if the defendant neither resides nor carries on business within such district registry, the writ must give him his option of either appearing there or in London. (Order 5.)

Q. **How does the plaintiff in an action in the High Court signify in which Division he sues?**

A. By marking the writ of summons with the Division, and if in the Chancery Division, then in addition with the name of one of the judges (Order 6). But this is subject to the power of transfer by the Court.

Q. **Can concurrent writs be issued?**

A. Yes, at any time within twelve months after issuing the original writ, and they are to be marked with a seal bearing the word "concurrent." (Order 6.)

Q. **What disclosures can be demanded by a defendant from plaintiffs and their solicitors?**

A. He may demand from the solicitor whether the writ has been issued by his authority, and if he answers in the negative, all further proceedings are to be stayed; and if partners sue in the name of their firm, the defendant may demand of them or their solicitor the names and places of residence of all the persons constituting the firm. (Order 7.)

Q. **How long does a writ of summons remain in force, and can it be renewed?**

A. It is in force for twelve months, and when it has not been served may by leave be renewed for six months, and so on from time to time, on satisfying the judge or registrar that reasonable efforts have been made to serve it, or for other good reason. (Order 8.)

Q. **How is the writ of summons to be served?**

A. When practicable, in the same way in which personal service is now made; but if it is made to appear to the

Court or a judge that the plaintiff cannot effect prompt personal service, an order for substituted or other service may be made. No service is required where a solicitor agrees to accept service, and enters an appearance. (Order 9, rr. 1, 2.)

Q. **When husband and wife are defendants, must both be served?**

A. No; it is sufficient to serve the husband, but the Court may order that the wife shall be served, with or without service on the husband. (Order 8, r. 3.)

Q. **How is service on an infant defendant to be effected?**

A. By service on the father or guardian, and, if none, service on the person with whom the infant resides, or under whose care he is, shall be good, unless the Court or judge otherwise orders, and the Court or judge may order that service on the infant himself shall be good service. (Order 9, r. 4.)

Q. **The same question as to a lunatic?**

A. By service on the committee or person with whom he resides, or under whose care he is, unless the Court or judge otherwise orders. (Order 9, r. 5.)

Q. **How should partners be sued, and how should the writ be served?**

A. In the name of their firm, and the writ served on any one of them, or at their principal place of business within the jurisdiction, upon the person managing or having control there. (Order 9, r. 6.)

Q. In an action to recover land when the possession is vacant, how may the writ be served?

A. When it cannot be otherwise effected, by posting a copy of the writ upon the door of the dwelling-house, or other conspicuous part of the premises. (Order 9, r. 8.) (See general provisions as to ejectment, *post*, pp. 79, 80.)

Q. Can a writ of summons be served out of the jurisdiction?

A. Yes; by leave of a Court or judge, when the subject-matter of the action is property within the jurisdiction or relating thereto, or a contract made or entered into or broken within the jurisdiction, or whenever any act or thing sought to be restrained or removed, or for which damages are sought, was or is to be done, or is situate within the jurisdiction (Order 2, r. 4, and Order 11, r. 1). Every application for such leave is to be supported by affidavit shewing in what country the defendant may probably be found, and whether he is a British or foreign subject (in which latter case the service would be of a notice of the writ, instead of the writ), and the grounds of the application, and the order giving leave is to limit a time for appearance. (Order 11, rr. 3 and 4.)

2. *Appearance.*

Q. Where is an appearance to an action to be entered?

A. If the writ is issued in London, of course in London; if in a district registry, if the defendant resides or carries on business within the district, he shall appear there, and

if issued in the district and he does not so reside or carry on business, he can appear either in London or the district registry. (Order 12, rr. 1–3.)

Q. If to a writ issued in a district registry, some or one of the defendants appear there, and some or one in London, where is the action to be continued?

A. In London, unless the Court or a judge shall be satisfied that the defendant or defendants appearing in London is or are merely a formal defendant or defendants. (Order 12, r. 5.)

Q. Is it necessary for a defendant to give the plaintiff's solicitor notice of his appearance?

A. Only if he appears elsewhere than where the writ is issued, or after the proper time for appearance. (Order 12, rr. 6 and 15.)

Q. How are partners sued in their firm's name to appear?

A. They shall appear individually in their own names, but all subsequent proceedings are to continue in the name of the firm. (Order 12, r. 12.)

Q. Within what time is a defendant to appear to a writ of summons?

A. Within eight days (see form of writ in Appendix A. to Judicature Act, 1875, Part I.)

Q. If on a defendant not appearing, it appears that he is an infant, or person of unsound mind not so found by inquisition, what course can the plaintiff take?

A. He may apply to a Court or a judge that some proper person may be assigned guardian to defend the

suit, and in support of such application must shew that the writ was duly served, and that after the time for appearance, and at least six days before the hearing, notice of such application was served upon or left at the dwelling-house of the person with whom, or under whose care, such defendant was at the time the writ was served; and also if an infant, served upon or left at the dwelling-house of the father or guardian of such infant, unless at the hearing of the application this latter necessary is dispensed with. (Order 13, r. 1.)

Q. **In the event of the non-appearance of an ordinary defendant, what is the course for the plaintiff to take?**

A. This differs as to the nature of the writ, and they had therefore better be stated separately.

(1.) *Where the writ is specially indorsed* (see, *ante*, p. 35), on affidavit of service the plaintiff may at once sign final judgment, as he would under the old system have done at Common Law under a specially indorsed writ. If some appear, he may proceed against them, notwithstanding that he signs judgment and issues execution against those not appearing. (Order 13, rr. 3 and 4.)

(2.) *Where the writ is for a fixed sum, but not so specially indorsed,* the plaintiff may file an affidavit of service, and a statement of the particulars of his claim, and after eight further days sign final judgment. (Order 13, r. 5.)

(3.) *Where the writ is for unliquidated damages, or for detention of goods,* the plaintiff may, on affidavit of service, at once sign interlocutory judgment, after which

the damages are to be ascertained by a writ of inquiry, or they may be ordered to be ascertained in any way in which any question arising in an action may be tried (see *post*, pp. 64, 65). (Order 13, r. 6.)

(4) *If the writ is in respect of a Chancery matter*, on filing an affidavit of service, the action may proceed as if the defendant had appeared. (Order 13, r. 9.)

3. *Parties; Joinder of Causes of Action.*

Q. What is the consequence of a misjoinder of persons as plaintiffs?

A. Judgment may be given for such one or more as may be found to be entitled, without any amendment, but the defendant is to be entitled to any extra costs occasioned by such misjoinder. The Court, or a judge also, if satisfied that a person wrongly made plaintiff has been so made by mistake, may order any other person or persons to be substituted, and generally no action is to be defeated by reason of misjoinder of any parties, either as plaintiffs or defendants, and the Court may order the names of any defendants to be struck out at any time. (Order 16, rr. 2, 3, and Order 13.)

Q. What is the consequence of the nonjoinder of persons who should have been joined as plaintiffs?

A. The Court, if satisfied that the nonjoinder was through mistake, and that it is necessary to do so, may order any person or persons to be added as plaintiffs on such terms as may seem just, his or their consent being given thereto. (Order 16, rr. 2 and 13).

Q. **What is the consequence of misjoinder of defendants?**

A. Notwithstanding any misjoinder, judgment may be given against such one or more as may be found liable, without any amendment; and, generally, no action is to be defeated by reason of misjoinder. (Order 16, r. 3.)

Q. **What is the consequence of nonjoinder of defendants?**

A. They may be joined by leave of the Court or a judge; and unless otherwise ordered, the plaintiff is to file an amended copy of and sue out a writ of summons, and serve such defendant therewith; and any statement of claim which has been delivered is also to be amended and served. (Order 16, rr. 13, 15, and 16.)

Q. **Is it necessary for all the defendants to the action to be interested to the same extent?**

A. No; but the Court or a judge may make such order as may appear just, to prevent any defendant being embarrassed or put to expense when he may have no interest. (Order 16, r. 4.)

Q. **Can a holder of a bill of exchange in an ordinary action join the acceptor and prior indorsers?**

A. Yes; a plaintiff may now at his option join in the same action all parties liable on any one contract, including the case asked in the question. (Order 16, r. 5.)

Q. **If a person is doubtful against which of two persons he can sustain a claim, what course can he adopt?**

A. He may join the two in one action to the intent that

the question as to which is liable and to what extent may be determined. (Order 16, r. 6.)

Q. Are the persons beneficially interested in an estate necessary parties to an action against trustees, executors, or administrators?

A. No; it is sufficient to bring the action against the latter, who shall represent the beneficiaries; but the Court or a judge may at any time order any of such persons to be made parties. (Order 16, r. 7.)

Q. How are married women and infants to sue and defend an action?

A. Exactly as they would formerly have done in Chancery, *i.e.*, sue by next friend and defend by guardian; and the rule also provides that the Court or a judge may give married women leave to sue or defend not only apart from their next friend, but without a next friend, on giving such security (if any) for costs as the Court or a judge may require. (Order 16, r. 8.)

Q. How are lunatics and persons of unsound mind not so found by inquisition to sue or be sued?

A. In all cases in which formerly they might have sued or been sued, they may sue by their committee or next friend in the manner formerly practised by the Court of Chancery, and may in like manner defend by their committees or guardians appointed for that purpose. (Order 18.)

Q. What is the course as to suing or defending where there are numerous parties having the same interest?

A. One or more of such persons may sue or be sued, or

be authorized by the Court to defend such action on behalf of the others. (Order 16, r. 9.)

Q. At what period of an action should an application be made to strike out or substitute a plaintiff or defendant?

A. It may be made at any time before trial by motion or summons, or at the trial in a summary way. (Order 16, r. 14.)

Q. An action is brought against a defendant who, on the whole amount being recovered from him, will have a claim for contribution against a third person (e.g., in the case of a defendant being one of several sureties). What entirely new provision has been made by the Rules for such a case?

A. In any such case the Court or a judge may, on notice being given to any such third person, make such order as may be proper for having such claim determined, notwithstanding that he is not a party to the action. (Order 16, r. 17.)

Q. State the procedure in such a case as is mentioned in the last question?

A. The defendant is within the time for delivering his statement of defence to serve such third person with a notice of his claim, together with a statement of the plaintiff's claim, or if there is not one, then with a copy of the writ in the action. If the third person desires to dispute all liability, he must enter an appearance in the action within eight days from the service of the notice, or after that time may be allowed to appear by the Court or a judge; and after appearance the party giving the notice is to apply to the Court or a judge for

directions as to the mode of determining the question in the action, and leave to such third person to defend may be given on such terms as shall seem just, and generally all proper directions may be given.

If the third person, after being so served as above stated, makes default in appearing, he is to be deemed to admit the validity of the judgment which may be obtained against the defendant in the action, whether it is obtained by consent or otherwise. (Order 16, rr. 18–21.)

Q. May a plaintiff unite several causes of action in the same action?

A. Yes; the rules provide that he may do so, save in the following cases:

(1.) (Except by special leave.) An action for recovery of land cannot be joined with any other cause of action, except in respect of mesne profits or arrears of rent, and damages for breach of any contract under which the same or any part thereof is held.

(2.) (Except by like leave). Claims by a trustee in bankruptcy as such, cannot be joined with any other claim by him in any other capacity.

But although different causes of action may be so joined, if it appear to the Court or a judge that they cannot be conveniently tried together, separate trials may be ordered; and any defendant may apply, alleging that such causes cannot be conveniently disposed of together, and the Court or a judge may order any such causes to be excluded. (Order 17, rr. 1–3, 8, and 9.)

Q. **In an action by or against husband and wife, may a separate claim against either be joined?**

A. Yes; subject, of course, to what is stated in the latter part of the last answer. (Order 17, rr. 4 and 7.)

Q. **In an action by or against an executor or administrator, may a personal claim by or against him be joined?**

A. Only if it arises with reference to the estate in respect of which he sues or is sued as administrator; but this again is subject as before. (Order 17, rr. 5 and 7.)

Q. **Several plaintiffs have a joint claim against one defendant, and one of them also a separate claim against him. Can these claims be joined in one action?**

A. Yes, this may be done; but this again is subject as before. (Order 17, rr. 6 and 7.)

4. *Pleadings.*

Q. **What are to be the ordinary pleadings in an action?**

A. Unless the defendant at the time of appearance states that he does not require it, the plaintiff is to deliver a statement of his complaint and of the relief or remedy he claims within six weeks; the defendant then within eight days is to deliver a Statement of his Defence, set-off, or counter claim (if any), and the plaintiff, within three weeks is to deliver a Statement of Reply (if any) thereto. (Order 21, r. 1; Order 22, r. 1; and Order 24, r. 1.)

Q. State the chief rules as to all such pleadings generally?

A. They are to be as brief as the case will admit; and any costs occasioned by unnecessary prolixity are to be borne by the party chargeable therewith; they are to be divided into paragraphs numbered consecutively, each paragraph as nearly as may be containing a separate allegation; dates, sums, and numbers are to be expressed in figures; the signature of counsel is not to be necessary; they are to be printed, unless containing less than three folios (of seventy-two words each), when they may be written or printed, or partly one and partly the other; they are to be delivered according to the present practice, and if no appearance has been entered by being filed with the proper officer; they are to be marked on the face with the date when delivered and the reference to the action, the Division to which and the judge (if any) to whom assigned, the title of the action, the description of the pleading, and the name and place of business of the solicitor and agent (if any), or the name and address of the person delivering the same, if acting in person; and in a pleading denying any allegation in a previous pleading it must not do so evasively, but answer the point in substance, and generally a fair and substantial answer must be given. (Order 19, rr. 2, 4–7, and 22.)

Q. What great extension of the principle of set-off by a defendant is allowed by the Rules?

A. It is provided that a defendant may set off, by way of counter-claim, any right or claim, *though sounding in*

damages, and the Court may pronounce final judgment thereon in the same action; but the Court or a judge, if of opinion that such counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, may refuse permission to the defendant to avail himself thereof. (Order 19, r. 3.)

Q. **A plaintiff sues in a representative capacity (as trustee, executor, or the like), which capacity the defendant denies. Can he set up such denial at the trial, his statement of defence only denying the debt?**

A. No; he must deny the matter specifically. (Order 19, r. 11.)

Q. **Under a statement of defence of "never indebted" can the defendant shew at the trial that the debt is barred by the Statute of Limitations?**

A. No; it is provided, by analogy to the present Pleading Rules at Common Law, each party in the pleading must allege all facts not appearing in previous pleadings that he means to rely on, and must raise all such grounds of defence or reply (as the case may be), which if not so raised would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings. (Order 19, r. 18.)

Q. **What do the Rules provide as to pleas in abatement and new assignments?**

A. It abolishes them, and any matter which has formerly been introduced by new assignment is to be introduced by amendment of the statement of claim. (Order 19, rr. 13 and 14.)

Q What is the effect of not specifically denying any allegation of fact appearing in a pleading other than a petition or summons?

A. The effect is that it is to be taken as admitted, except as against infants, lunatics, or persons of unsound mind not so found by inquisition. (Order 19, r. 17.)

Q. Would a general statement of defence of "never indebted" by a defendant, be good?

A. No. Order 19, r. 20, provides that it shall not be sufficient for a defendant in his defence, or a plaintiff in his reply, to deny generally the claim or counter-claim; but the party must deal specifically with each allegation of fact of which he does not admit the truth.

Q. What is to be the effect of a bare denial by a defendant in his pleading of a contract alleged by the plaintiff in his statement of complaint?

A. It is to be construed only as a denial of the making of the contract in fact, and not of its legality or sufficiency in law, whether with reference to the Statute of Frauds or otherwise. (Order 19, r. 23.)

Q. What is to be the effect of joinder of issue in an action?

A. It is to operate as a denial of every material allegation of fact in the pleading on which issue is joined (except any facts which the party may be willing to admit). (Order 19, r. 21.)

Q. If some document is depended on by the plaintiff or defendant should it be set out verbatim?

A. It is provided that it shall be sufficient to set it out

as briefly as possible, unless the precise words are material. (Order 19, r. 24.)

Q. **State a few of the provisions of the Rules having for their object the shortening and simplifying of the pleadings.**

A. Amongst the chief may be noticed the following:—

(1.) That where in any pleading it is necessary to allege malice, it is to be sufficient to simply allege it as a fact without setting out the circumstances from which it is inferred. (Order 19, r. 25.)

(2.) When it is material to allege notice, it shall be sufficient generally to simply allege it as a fact. (Order 19, r. 26.)

(3.) When any contract is to be implied from a series of conversations or letters, it is to be enough to allege such contract as a fact, and refer to such conversations or letters, without setting them out in detail. (Order 19, r. 27.)

(4.) No person need state in his pleading a fact presumed by the law in his favour, unless the same has first been specifically denied (thus, where the plaintiff is suing on a bill of exchange, the consideration for it). (Order 19, r. 28.)

Q. **Can a defendant plead or a plaintiff reply any matter which has arisen since action brought?**

A. Yes, this may be done; but if it arises after statement of defence has been delivered or after the expiration of the time for delivering the statement of defence or the

reply, it can only be done within eight days after such matter has arisen and by leave of the Court or a judge; and where any defence has arisen since the action the plaintiff may confess it and sign judgment for his costs up to the time of pleading it, unless the Court or a judge otherwise order (Order 20.) This is similar to the present plea of *puis darrein continuance.*

Q. Within what time is the plaintiff to deliver his statement of claim?

A. Within six weeks after appearance. It can only be delivered after this time by leave of the Court or a judge. (Order 21, r. 1.)

Q. What is the consequence of the plaintiff not delivering it within the above time?

A. If the defendant has not stated (as he may do) that he does not require it, he may at the expiration of such time apply to dismiss the action for want of prosecution. (Order 29, r. 1.)

Q. Is a statement of claim necessary when the writ has been specially indorsed?

A. Yes, unless the defendant has dispensed with it; but unless otherwise ordered, a notice to the effect that the claim is that which appears by indorsement upon the writ is to be sufficient. (Order 21, r. 4.)

Q. Within what time is the defendant to deliver his statement of defence?

A. Within eight days from delivery of the statement of claim; if the defendant has waived the delivery of a statement of claim, then he must deliver the defence within

eight days from his appearance; if the writ having been specially indorsed, the defendant has had to get an order for leave to defend, and the order does not specify any time, he must appear within eight days after the order. (Order 22, rr. 1—3.)

Q. What is the consequence of the defendant not delivering his statement of defence within the time limited?

A. (1.) If the action is for a fixed liquidated sum the plaintiff may at the expiration of the time sign final judgment, and if there are several defendants and only one makes default, the judgment may be signed and execution issued against him and the action proceeded with against the others. (Order 29, rr. 2, 3.)

(2.) If the action is for damages or detention of goods, interlocutory judgment may be signed and a writ of inquiry issued, and if there are several defendants and only one makes default, interlocutory judgment may be signed as to that one and the action proceeded with against the others, no separate writ of inquiry being issued, but the damages as to all being assessed at the trial. (Order 29, rr. 4, 5.)

(3.) If the action is partly for a fixed liquidated sum and partly for damages or detention of goods, then as to each part the plaintiff will proceed as above stated. (Order 29, r. 6.)

(4.) In other cases the plaintiff may set down the action on motion for judgment, and if there are several defendants, and only one makes default, the plaintiff may

either set down the action at once against him, or wait till it is entered for trial or set down on motion for judgment against the other defendants. (Order 29, rr. 10 and 11.)

Q. **If the defence in an action raises questions between plaintiff and defendant and third persons not parties, how can such questions be determined?**

A. The defendant is to set forth in his defence the names of all such persons, and they are to be summoned to appear by being served with a copy of such defence, and the action proceeds generally as though they had been made parties. (Order 22.)

Q. **What is the consequence if such third persons having appeared make default in pleading?**

A. The opposite party may apply to the Court or a judge for such judgment (if any) as upon the pleadings he may appear entitled to. (Order 29, r. 13.)

Q. **Is the plaintiff in an action at liberty at any time to discontinue it?**

A. He may give a notice of discontinuance before the defendant has delivered his statement of defence, or after, before taking any proceeding other than a mere interlocutory application. Beyond this he cannot discontinue or withdraw the record without leave of the Court or a judge. (Order 23.)

Q. **Within what time is a plaintiff to deliver his reply (if any)?**

A. Within three weeks after the defence or last of the defences shall have been delivered. (Order 24, r. 1.)

Q. Are there to be any pleadings subsequent to reply?

A. Not without leave of the Court or a judge, except joinder of issue; the time for delivering any subsequent pleading that may be allowed is four days from the previous pleading. (Order 24, rr. 2 and 3.)

Q. When are the pleadings to be closed?

A. When either party joins issue without adding any further or other pleading thereto. (Order 25.)

Q. If it appears to a judge that the pleadings are ambiguous, and do not clearly define the issues of fact in dispute, what course can he direct to be taken?

A. He may direct the parties to prepare issues, to be settled by him if they differ. (Order 26.)

Q. What general provisions do the Rules contain as to amendment of pleadings?

A. They give generally very full powers to the Court or a judge to allow of amendments, even at the trial; and in particular the plaintiff before the expiration of his time to reply, or where no defence delivered within four weeks from the appearance of the defendant who last appeared, and the defendant before the expiration of his time for pleading to the reply, or if no reply within twenty-eight days from filing his defence, may amend his statement of claim or defence as the case may be, *without any leave.* (Order 27.)

Q. Within what time after obtaining an order for that purpose must a party amend his pleading?

A. Within fourteen days; otherwise the order is to

become ipso facto void unless the time is extended. (Order 27, r. 7.)

Q. How are amendments to be made?

A. If they do not exceed two ordinary folios (*i.e.* seventy-two words each folio) in any one place, the amendments may be made in writing, unless it would render the pleading difficult or inconvenient to read, in which case, or if they exceed the before-mentioned length, the pleading must be reprinted. The pleading is to be marked "amended," and to be delivered to the opposite party within the time allowed for amending. (Order 27, rr. 8, 9, and 10.)

Q. What are the chief provisions of the Rules as to demurrers?

A. The Rules provide that any party may demur, and the demurrer is to state specifically whether it is to the whole or to a part, and shall state some ground in Law for the demurrer; but on argument, the party may go beyond such ground; a defendant desiring to demur as to part and put in a defence as to the rest, is to combine the two in one pleading; and while a demurrer is pending no amendment of a pleading can be made without order, which order must be on payment of the costs of the demurrer. (Order 28.)

Q. In what action is the defendant to be at liberty to pay money into Court?

A. In any action to recover a debt or damages (formerly as a rule money could not be paid into Court in an action for unliquidated damages). The payment into

Court must be before delivery of defence, unless by special leave at a later time. The plaintiff may accept such payment in Court in full satisfaction, and at once tax his costs and sign judgment for them. (Order 30, rr. 1 and 4.)

Q. **If the plaintiff does not accept a payment into Court in full satisfaction, can he yet obtain the money which has been paid into Court at once?**

A. Yes; unless otherwise ordered it may be paid out to the plaintiff or his solicitor on the written authority of the plaintiff. (Order 30, r. 3.)

5. *Discovery, Inspection, &c.* (*a*).

Q. **At what period in an action can plaintiff or defendant administer interrogatories to his opponent?**

A. The plaintiff may do so with his statement of claim, and the defendant with his statement of defence, or either of them at any subsequent period *before the close of the pleadings*, without any order for that purpose; and they may also be administered at any time by leave of the Court or a judge. (Order 31, r. 1.)

Q. **Where the defendant to an action is a body corporate or joint stock company, to whom would the plaintiff administer interrogatories?**

A. He should apply in chambers for leave to administer interrogatories to any member or officer. (Order 31, r. 4.)

(*a*) For a very full and valuable statement of and dissertation on the law as to discovery and inspection generally, the student is referred to the before quoted work on the Judicature Acts by Mr. Downes Griffith, pp. 229–270.

Q. What is the remedy if parts of interrogatories are scandalous or irrelevant?

A. They may be ordered to be struck out. (Order 31, r. 5.)

Q. How and within what time are interrogatories to be answered?

A. By affidavit, to be filed within ten days, and if exceeding three folios such affidavit must be printed. (Order 31, rr. 6 and 7.)

Q. What is the mode of objecting to the sufficiency of an affidavit in answer?

A. No exceptions are to be filed as formerly to an answer in Chancery, but the sufficiency or insufficiency is to be determined by the Court or a judge on motion or summons. An application may also be made to the Court or a judge for a further answer. (Order 31, rr. 9 and 10.)

Q. If a plaintiff or defendant has put in several answers to interrogatories, is the opponent at liberty to use one of the answers as evidence at the trial without the other?

A. Yes, he may do so; but the judge may look at the whole of the answers, and if he considers them so connected that the one ought not to be used without the other, he may direct them all to be put in. (Order 31, r. 23.)

Q. How may a party to an action obtain a discovery of documents from his opponent?

A. By applying to a judge without filing any affidavit in support of his application. (Order 31, r. 12.)

Q. In what different ways can a party to an action obtain an inspection of documents in his opponent's possession?

A. (1.) He can apply for an order to inspect. (Order 31, r. 11.)

(2.) He may give notice to produce any document mentioned in his opponent's pleadings or affidavit of documents, and if this notice is not complied with the opponent will be prevented from giving such document in evidence unless he shews the Court that he had sufficient cause for not complying with such notice. (Order 31, r. 14.)

Q. What is the proper course to be taken by a party on whom such notice to produce as is last mentioned is served?

A. Unless he objects on good grounds to produce the document he should within two days from the receipt of such notice if the documents are all specified in his affidavit of documents, or within four days if not so specified by affidavit, deliver a notice stating a time within three days at which the document may be inspected at his solicitor's office. If he omits to do this, the party desiring the inspection may apply to a judge for an order for inspection. (Order 31, rr. 16 and 17.)

Q. Is any affidavit necessary in support of an application for inspection?

A. Yes, except in the case of documents referred to in the pleadings or affidavit of the party against whom the application is made there must be an affidavit shewing (*a*) of what documents inspection is sought; (*b*) that the

party applying is entitled to inspect; and (*c*) that they are in the possession or power of the other party. (Order 31, r. 18.) This rule does not say that the affidavit is to be made by the party or his attorney.

Q. What is the remedy against a party failing to obey an order for discovery or inspection?

A. He is to be liable to attachment, and also, if a plaintiff, to have his action dismissed for want of prosecution. And if a defendant to have his defence struck out, and to be placed in the same position as if he had not defended. (Order 31, r. 20.)

Q. Is service of an order for discovery or inspection on the solicitor of the party sufficient service to found an application for an attachment for disobedience to it?

A. Order 31, r. 21, provides that it shall be, but the party against whom the application to attach is made may shew in answer to the application that he has had no notice or knowledge of the order; and in this case, by Rule 22 of the same Order, the solicitor is himself to be liable to attachment unless he has reasonable excuse.

Q. What provision do the Rules make as to admitting documents?

A. They make one similar to the present at Common Law, *i.e.*, a notice to inspect and admit may be given, and if not admitted, whatever the result of the action, the party refusing to admit must bear the costs of proving the documents unless the Court certify that the refusal

to admit was reasonable; and no costs of proving documents are to be allowed unless this notice is given, except where the omission to give the notice is in the opinion of the taxing officer a saving of expense. (Order 32, r. 2.)

Q. **At what stage of a suit may the Court direct inquiries or accounts to be made or taken?**

A. It is in the discretion of the Court to do so at any stage notwithstanding that there is some special or further relief sought for, or some special issue to be tried. (Order 33.)

6. *Special Case.*

Q. **Can a special case be still stated?**

A. Yes; directly after the writ of summons is issued the parties may concur in stating questions of law arising in the action for the opinion of the Court. Such special case is to be divided into paragraphs, numbered consecutively. (Order 34, r. 1.)

In addition to the special case by consent, if it appears to the Court or a judge that there is in any action a question of law which it would be convenient to have decided before any evidence is given on an issue of fact, an order may be made for such point of law to be raised for the opinion of the Court either by consent or otherwise. (Order 34, r. 2.)

Q. **Is a special case to be printed or written?**

A. It is to be printed and signed by the respective parties or their solicitors. (Order 34, r. 3.)

Q. Can a person under disability be a party to a special case?

A. Yes; but it cannot be set down for argument without leave of the Court or a judge, which will only be granted on shewing that the statements in such special case which affect such person under disability are true. (Order 34, r. 4.)

7. *Trial—Evidence.*

Q. What is to be the rule as to where an action is to be tried?

A. There is to be no local venue; the plaintiff can state any place in his statement of claim for the action to be tried at, and if he does not state any place the place of trial shall be Middlesex. A judge may make an order changing the place of trial; and his order is subject to be discharged or varied by a Divisional Court. (Order 36, r. 1.)

Q. State shortly the main provisions as to referees and assessors?

A. The Judicature Act, 1873, sect. 56, provides that, subject to such right as now exists to have particular cases submitted to a jury, any question in a cause (other than a criminal proceeding by the Crown) may be referred by the High Court, or Court of Appeal, or judge before whom it is pending, for inquiry and report, to any official or special referee, whose report may afterwards be adopted wholly or partially by the Court, and enforced as a judg-

ment by the Court. The said Courts may also, in any such cause as aforesaid, call in the aid of one or more assessors specially qualified and hear the same with their assistance.

Sect. 57 of the same Act provides that in a cause (other than a criminal prosecution by the Crown), involving a prolonged examination of documents or accounts, or a scientific investigation, which cannot conveniently be tried before the Court or a jury, the Court or a judge may order the trial to be before an official referee or a special referee to be agreed on.

Sect. 57 also provides that in any cause (other than a criminal prosecution by the Crown), all the parties who are under no disability may consent to the trial being before an official or a special referee to be agreed on.

Sect. 83 of the same Act provides for the appointment of official referees, to be permanent officers attached to the Supreme Court. Of course a special referee may be any one the parties choose to agree on, but when acting they will also be deemed officers of the Court (Jud. Act, 1873, sect. 58). With regard also to referees and their reports the Court or judge has, in addition to other powers, the same or like powers as are given with respect to references to arbitration by the Common Law Procedure Act, 1854. (Jud. Act, 1873, sect. 59.)

Q. In what different ways may actions be tried and heard?

A. Before either:—

(1) A judge or judges;

(2.) A judge sitting with assessors;
(3.) A judge and jury; or,
(4.) An official or special referee sitting with or without assessors. (Order 36, r. 2.)

Q. **At what period of the action should the plaintiff give notice of trial?**

A. With his reply, or at any time after the close of the pleadings and before entering the cause for trial. If he does not give notice of trial within six weeks after the close of the pleadings, the defendant may then give notice of trial. (Order 36, rr. 3, 10.)

Q. **How is the mode of trial to be determined?**

A. The party giving the notice of trial specifies in which mode, but the other party may, within four days, give notice to the effect that he desires to have the issues of fact tried before a judge and jury, and is entitled to have the same so tried. (Order 36, rr. 3 and 4.)

The Court or a judge also has power to order some questions of fact in an action to be tried in one way and some in another. (Order 36, r. 6.)

Q. **What notice of trial is to be given?**

A. Ten days, unless the defendant is under consent to take short notice, which is to be four days. (Order 36, r. 9.)

Q. **Is notice of trial to operate for any particular sittings or assizes?**

A. Not in London or Middlesex, where it is to be deemed to be the first day at which it can be reached after the expiration of the notice; elsewhere than in

London or Middlesex it is to be deemed to be for the then next assizes at the place for which notice of trial is given. (Order 36, rr. 11 and 12.)

Q. Can a notice of trial be countermanded?

A. Only by leave of the Court or a judge, which may be given on terms as to costs or otherwise. (Order 36, r. 13.)

Q. By which party is the cause to be entered for trial?

A. In London or Middlesex the party giving the notice should do so on the day after giving notice of trial, and if he does not, his opponent may within four days. Elsewhere than in London or Middlesex either party may enter the action; and if both enter it, it is to be tried in the order of the plaintiff's entry. (Order 36, rr. 14 and 15.)

Q. What is the result of the defendant not appearing at the trial?

A. The plaintiff may prove his case so far as the burden of proof lies on him. (Order 36, r. 18.)

Q. The like question as to the plaintiff not appearing?

A. The defendant will be entitled to judgment dismissing the action; and if he has any counter-claim may prove such claim so far as the burden of proof lies on him. (Order 36, r. 19.)

In either this case or the case in the previous question the verdict or judgment so obtained may be set aside on such terms as the Court or judge may think fit, on appli-

cation made by the other party within six days after the trial. (Order 36, r. 20.)

Q. Can a trial be postponed or adjourned?

A. Yes; the judge has full power to do this. (Order 36, r. 21.)

Q. Is there any rule as to the mode of proceeding at a trial before a referee?

A. He may hold the trial at, or adjourn it to any place he may deem most convenient, have any inspection or view, and shall, unless otherwise directed by the Court or a judge, proceed with the trial *de die in diem*, in a similar manner as in action tried by a jury. Subject to any order, evidence is to be taken before him, and the attendance of witnesses enforced by subpœna, and the trial is to be generally conducted, as nearly as circumstances will admit, as trials before a judge of the High Court, *but not so as to make the tribunal of the referee a public Court of Justice.* (Order 36, rr. 30–32.)

Q. Has the referee the power of committing to prison, or enforcing any order by attachment or otherwise?

A. No. Order 36, r. 33, specially provides that nothing in the rules shall authorize him to do this.

Q. Is the evidence in a cause to be vivâ voce or by affidavit?

A. In the absence of agreement between the parties, the evidence at the trial is to be *vivâ voce* and in open Court, unless the Court orders any particular fact to be proved by affidavit, or that any affidavit which has been

made may be read; provided that if it appears to the Court that the opponent *bonâ fide* desires to cross-examine a witness, an order is *not* to be made authorizing the evidence of such witness to be by affidavit.

Upon any motion, petition, or summons, evidence may be given by affidavit, on which the deponent may, by order of the Court or a judge, be cross-examined. (Order 37, rr. 1 and 2.)

Q. What rules are to be observed in framing affidavits?

A. They are to be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, when statements as to his belief, with the grounds thereof, may be admitted. (Order 37, r. 3.)

Q. State shortly the procedure when the parties have agreed to the evidence at the trial being by affidavit?

A. Within fourteen days after the consent the plaintiff is to file his affidavits and give notice thereof; the defendant has then fourteen days within which to file affidavits in answer, and the plaintiff subsequently has seven days within which to file affidavits in reply. The above times may be varied by agreement between the parties. The affidavits have to be printed. (Order 38, rr. 1–3.)

Q. When the evidence is by affidavit are the deponents liable to cross-examination? and state the procedure.

A. Yes; within fourteen days after the expiration of the time limited for filing affidavits in reply. Notice may be

given to the party filing any affidavit to produce the deponent at the trial for cross-examination, and if not produced his affidavit cannot be used as evidence without special leave. The party to whom the notice to produce any witness is given is to be entitled to compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined. (Order 38, rr. 4 and 5.)

Q. What important provision is made by the Rules as to the grounds for a new trial?

A. It is provided that a new trial shall not be granted on the ground of misdirection or the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned to the trial of the action; a new trial may be granted as to part of an action without interfering with the finding or decision upon any other question. (Order 39, rr. 3 and 4.)

Q. What is the procedure to obtain a new trial?

A. Within four days after the trial, or if the Court is not then sitting, within four days after it commences sitting, a motion for a new trial must be made. The order if granted will only be at first to shew cause why a new trial should not be granted, and a copy must be served on the opposite party within four days of it being granted, and cause shewn at the expiration of eight days from the date of the order or so soon after as the case can be heard. (Order 39, rr. 1 and 2.)

8. *Judgment and Execution.*

Q. How is judgment to be obtained after trial?

A. Except where otherwise provided by the Acts or Rules the judgment is to be obtained by motion for judgment. (Order 40, r. 1.)

Q. When the judge or referee before whom an action has been tried directs judgment to be entered subject to leave to move, how is the action to be proceeded with?

A. The party to whom leave is given is to set the action down on motion for judgment, and give notice thereof within ten days after the trial, or such time as the judge reserves. (Order 40, r. 2.)

Q. If the judge or referee, as the case may be, at the trial abstains from directing any judgment to be entered what is to be done?

A. The plaintiff should set the action down on motion for judgment within ten days after trial, otherwise the defendant may set it down in a like manner. (Order 40, r. 3.)

Q. Where no leave has been reserved, but the party considers the judgment wrong on some point of law or otherwise, what course can he take?

A. He may within four days after the trial move for an order to shew cause why the judgment should not be set aside and some other judgment entered, and such order is to be returnable in eight days (Order 40, rr. 4-6). He might also of course apply for a new trial.

Q. Where certain issues have been directed to be tried in an action, how should the plaintiff proceed after their trial?

A. He should within ten days set down the action on motion for judgment, and if he fails to do so the defendant may. (Order 40, r. 7.)

Q. When a person is entitled to set down an action on motion for judgment, is there any limit within which he may do so?

A. Except by the leave of the Court or a judge he cannot do so after the expiration of one year from the time when he first became entitled to set it down. (Order 4, r. 9.)

Q. On a motion for judgment is the Court bound to then give judgment?

A. No; if the Court considers that it has not sufficient materials before it, it may direct the motion to stand over for further consideration, and direct any issues to be tried or accounts and inquiries to be taken and made. (Order 40, r. 10.)

Q. How may a judgment by default be set aside?

A. It may be set aside by application to the Court or a judge on such terms as to costs or otherwise as the Court or judge may think fit. (Order 29, r. 14.)

Q. What important provisions do the Rules contain as to nonsuits in an action?

A. That any judgment of nonsuit unless otherwise ordered shall have the same effect as a judgment upon the merits for the defendant, except that it may be set

aside in cases of mistake, surprise, or accident, on such terms as to the Court or a judge shall seem just. (Order 41, r. 6.)

Q. What date is a judgment to bear?

A. The date of the day when pronounced, and in cases of judgment by default the date of the day when the documents were left with the proper officer for the purpose of entering judgment. (Order 41, rr. 2 and 3.)

Q. How is a judgment for recovery of money to be enforced?

A. As it might have been formerly (Order 42, r. 1). And if it is a judgment for payment of money into Court, by sequestration, or where attachment is authorized by law, by attachment. (Order 42, r. 2.)

Q. How is a judgment for recovery of property other than land or money to be enforced?

A. (1.) By writ for delivery of the property;
(2.) By writ of attachment;
(3.) By writ of sequestration. (Order 42, r. 4.)

And Order 42, r. 5, provides that a judgment requiring any act to be done other than payment of money, may be enforced by writ of attachment or by committal.

Q. If an action having been brought against a firm in their partnership name, judgment is obtained against them in that name, how can it be enforced?

A. Execution may issue against either:

(1.) Any of the partnership property;

(2.) Any person who has admitted on the pleadings that he is, or has been, adjudged a partner;

(3.) Any person who having been served as a partner with the writ has failed to appear; and,

(4.) If the party having judgment claims against any other person as being a member of the firm, he may apply to the Court or a judge for leave to issue execution against him, which leave may be given if not disputed, or if disputed, an order may be made for the liability of such person to be tried. (Order 42, r. 8.)

Q. **How is execution to be issued?**

A. By producing to the proper officer the judgment and a præcipe containing the title of the action, &c., and a form of writ of execution, which must be indorsed with the solicitor's name issuing it, and if he is agent then with the two names, and also with a direction to the sheriff or other officer or person to whom the writ is directed to levy the amount actually due. (Order 42, rr. 9-14.)

Q. **When may a writ of execution be issued on a judgment?**

A. Directly the judgment is duly entered; unless it names a period, and then not till after such period; but the Court may order execution to issue at a sooner or later period. The execution must be issued within six years of the judgment, and before any change in the parties has occurred by death or otherwise, unless leave is obtained from the Court or a judge to issue execution afterwards. (Order 42, rr. 15, 18 and 19.)

Q. **How long does a writ of execution remain in force, and how may it be renewed?**

A. For one year; it may be renewed by the writ itself,

or a notice of renewal to the sheriff, being marked with a seal of the Court bearing the date of such renewal, which shall be sufficient evidence of the renewal. (Order 42, rr. 16 and 17.)

Q. How is an order made in the course of an action to be enforced?

A. In the same manner as a judgment to the same effect. (Order 42, r. 20.)

Q. Do the Rules contain any provision as to garnishee orders?

A. Yes; generally, by Order 45, a like practice is provided as heretofore in the Courts of Law.

Q. Can a charging order or a writ of distringas be issued by the Court?

A. Yes; a charging order can be issued by any divisional Court or judge, and a writ of distringas can be issued out of any office of the High Court in London where writs of summons are issued, as heretofore. (Order 46.)

Q. Can a writ of attachment or sequestration be issued as of course?

A. A writ of attachment cannot be issued without leave to be obtained on notice to the party sought to be attached (Order 44, r. 2); but a writ of sequestration can be issued as of course after service of any judgment or order, and the expiration of the time thereby limited. (Order 47.)

9. *Abatement.*

Q. What is to be the effect of the marriage, death, bankruptcy, or devolution of estate by operation of law, of any party to an action?

A. The action is not to abate, but an order may be made for the husband, personal representative, trustee, or other successor in interest (if any) to be made a party to the action, or served with notice thereof, and such order as may be just may be made for the disposal of the action. (Order 50, rr. 1 and 2.)

Q. If after the commencement of an action any person interested in it comes into existence, what course is to be taken?

A. If necessary or advisable an order may be obtained *ex parte* that the action shall be carried on between the continuing party and such new party. Such order is to be served on the new party, who may apply to the Court or a judge to discharge or vary it within twelve days from service. (Order 50, rr. 4–6.)

10. *Incidental Procedure, Time, &c.*

Q. What course can the Court or a judge adopt in respect of property the subject of a pending action, beyond appointing a receiver?

A. An order may be made for its preservation or interim custody, or for it to be brought into Court, or otherwise secured; and if any property is of a perishable nature, or for other reasons it appear desirable, an order may be made for its sale. (Order 52, rr. 1 and 2.)

Q. An action is brought to recover certain property, and the defendant sets up a lien thereon for £1000, what course can the plaintiff at once take?

A. He may apply to the Court, or a judge, to be at liberty to pay into Court, to abide the result of the action, the amount of such lien, and any further sum that may be directed for interest or costs, and that upon such payment the property be given up to him. (Order 52, r. 6.)

Q. As a general rule how are applications to the Court or a judge in Court to be made?

A. By motion, notice of which must be served two clear days before, but it may be made *ex parte* when the delay would entail irreparable or serious injury. (Order 53, rr. 1–4.)

Q. Where any defendant having been duly served has failed to appear to the action, can he be served with any notice of motion or other notice?

A. Yes; and this without any special leave. (Order 53, r. 7.); but if his time for appearance has not expired, special leave to make such service must be obtained. (Order 53, r. 8.)

Q. As a general rule how are applications to be made in Chambers?

A. By summons. (Order 54, r. 1.)

Q. What is to be the extent of the jurisdiction of the Masters of the Queen's Bench, Common Pleas, and Exchequer Divisions?

A. They may transact all such business, and exercise all such authority and jurisdiction as under the Acts or Rules may be transacted by a judge at Chambers,

except in respect of the following proceedings and matters, *i.e.*,

- All matters relating to criminal proceedings or to the liberty of the subject;
- The removal of actions from one Division or judge to another Division or judge;
- The settlement of issues, except by consent;
- Discovery, whether of documents or otherwise, and inspection, except by consent;
- Appeals from district registrars;
- Interpleader, other than such matters arising in interpleader as relate to practice only, except by consent;
- Prohibitions;
- Injunctions, and other orders under sub-sect. 8 of sect. 25 of the Act, or under Order 52, rules 1, 2, and 3 respectively;
- Awarding of costs, other than the costs of any proceeding before such Master;
- Reviewing taxation of costs;
- Charging orders on stocks, funds, &c., or annual produce thereof;
- Acknowledgments of married women. (Order 54, r. 2.)

Q. **Where any act is ordered to be done within a certain number of months, what is meant?**

A. Calendar months, unless otherwise expressed. (Order 57, r. 1.)

Q. State what days are not to be included in the computation of time?

A. (1.) Where the time limited for doing any act is less than six days, Sunday, Christmas Day, and Good Friday, shall not be counted. (Order 57, r. 2.)

(2.) Where the last day for doing any act, which cannot be done when the offices are closed, expires on a Sunday or other day when they are closed, it shall be held to be duly done if done on the first day on which the offices open. (Order 57, r. 3.)

(3.) No pleading shall be delivered or amended during the long vacation, nor shall the time of the long vacation be reckoned in the time allowed upon filing, amending, or delivering any pleading, *unless otherwise directed by the Court or a judge.* (Order 57, rr. 4 and 5.)

Q. If in any proceeding in an action the Rules are not observed does it render the proceedings void?

A. No; but such proceeding may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with, as and upon such terms as the Court or judge shall think fit. (Order 59.)

11. *Costs.*

Q. State the rule laid down by Order 55 of the Rules of Court as to costs?

A. Costs are to be in the discretion of the Court, but where any issue has been tried by a jury, the costs are to follow the event, unless at the trial the judge otherwise

orders. Nothing herein contained is to deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity.

12. *Ejectment.*

Q. **How are proceedings for the recovery of land to be commenced?**

A. In the same manner as other actions, *i.e.*, by a writ of summons. (Order 2, r. 1.)

Q. **How is the writ of summons to be served in the case of vacant possession?**

A. By posting a copy upon the door or other conspicuous part of the property. (Order 9, r. 8.)

Q. **Can any person not named in the writ of summons appear and defend?**

A. He may by leave of the Court or a judge, on shewing by affidavit that he is in possession by himself or by his tenant, and if a person is in possession only by his tenant, he must state in his appearance that he appears as landlord. (Order 12, rr. 18 and 19.)

Q. **Can a defendant limit his defence to part only of the lands sued for?**

A. Yes, as formerly, delivering his notice within four days after appearance. (Order 12, r. 21.)

Q. **Where a defendant does not appear, or appearing limits his defence, how can the plaintiff proceed?**

A. He may enter judgment in the first case for the

whole land claimed, and in the second for the part, and recover possession; and if his writ also claimed mesne profits, he may proceed as to them in the same way as in any ordinary action. (Order 13, rr. 7 and 8.)

Q. **Can any other cause of action be joined with an action for recovery of land?**

A. No; except claims in respect of mesne profits or arrears of rent in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same, or any part thereof, are held. (Order 17, r. 2.)

Q. **In an action for recovery of land are the pleadings to be as in other actions?**

A. No; it is provided that a defendant in such an action, in possession by himself or his tenant, need not plead his title unless his defence is of an equitable nature, and except in such case it shall be sufficient to state, by way of defence, that he is so in possession, and he may rely upon any ground of defence which he can prove. (Order 19, r. 15.)

Q. **How is judgment in an action for recovery of land to be enforced?**

A. As formerly, by writ of possession.

13. *Appeals.*

Q. **How are appeals to be heard and determined?**

A. Where the subject-matter of the appeal is a final decree, order, or judgment, it is to be heard before at

least three judges, but if it is only an interlocutory decree, order, or judgment, it can be heard before two judges, and if any doubt arises as to what are interlocutory and what final it shall be determined by the Court of Appeal. No judge of the Court of Appeal is to hear an appeal from a judgment or order made by himself, or a Divisional Court of which he was or is a member. (Jud. Act, 1875, sects. 12 and 4, instead of sects. 53 and 54, in Act of 1873, repealed.)

Notwithstanding the above any incidental direction not involving the decision of the appeal may be given by a single judge of the Court of Appeal, who may also during vacation make any interim order. (Jud. Act, 1873, sect. 52.)

Q. **What orders of the High Court are not to be subject to appeal?**

A. Orders by consent, or as to costs only, which are by law left to the discretion of the Court, except by special leave. (Jud. Act, 1873, sect. 49.)

Q. **How can an order made in Chambers be discharged?**

A. Upon notice, by any Divisional Court or judge sitting in Court according to the course and practice of the Division of the High Court to which such particular cause or matter is assigned. (Jud. Act, 1873, sect. 50.)

Q. **If a party is dissatisfied with the Master's decision on any application what can be done?**

A. It is to be in the option of the Master to refer the

matter to a judge, and also any person may appeal from a master's decision to a judge at chambers by summons within four days after the decision complained of, but such appeal is to be no stay to proceedings unless so ordered. (Order 54, rr. 2–5.)

Q. **Within what time must an appeal be made from the decision of a judge in Chambers in the Queen's Bench, Common Pleas, or Exchequer Divisions?**

A. Within eight days after the decision complained of. (Order 54, r. 6.)

Q. **What provision is made by the Rules as to bills of exceptions and proceedings in error?**

A. Both are abolished. (Order 58, r. 1.)

Q. **What is the procedure to appeal?**

A. The appeal is to be by notice of motion in a summary way, and no petition, case, or other formal proceeding is to be necessary; this notice need only (unless otherwise ordered), be served upon the parties directly affected by the appeal. If the appeal is from a final or interlocutory judgment the appeal notice is a fourteen days' notice, and if from an interlocutory order a four days' notice. The appeal is to be set down on production to the proper officer of the Court of Appeal of the judgment or order appealed from, or an office copy of it, and leaving with him a copy of the notice of appeal to be filed, and such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal. (Order 58, rr. 2, 4, 8, and 15.)

Q. Can the Court of Appeal receive further evidence upon questions of fact?

A. Yes, the Court has full discretionary power to do so, such evidence to be either oral, by affidavit, or deposition; and such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. (Order 58, r. 5.)

Q. If a respondent to an appeal is also dissatisfied with the decision appealed against on some point, is it necessary for him to give notice of motion by way of cross appeal?

A. No; he need simply give notice of his intention to contend that the decision of the Court below should be varied to any parties who may be affected by such contention. If the appeal is from a final judgment, the notice is to be an eight days' notice, and if from an interlocutory order a two days' notice. (Order 58, rr. 6 and 7.)

Q. When evidence has been taken orally in the Court below how is it to be brought before the Court of Appeal?

A. By production of a copy of the judge's notes, or such other materials as the Court may deem expedient. (Order 58, r. 11.)

Q. Within what time must an appeal be brought (1) from an interlocutory order, (2) in other cases?

A. (1.) Within twenty-one days.

(2.) Within one year.

Unless allowed afterwards in either case by special leave. (Order 58, r. 15.)

Q. **Is an appeal to operate as a stay of execution?**

A. Not unless so ordered by the Court appealed from or any judge thereof, or the Court of Appeal. Any application for a stay of execution should be made in the first instance to the Court below. (Order 58, rr. 16 and 17.)

Q. **Within what time must an appeal be made from any order or decision made or given in the winding-up of a company?**

A. Within twenty-one days. (Order 58, rr. 9 and 15.)

Q. **To what Court is an appeal from the London Court of Bankruptcy to be made?**

A. To Her Majesty's Court of Appeal. (Jud. Act, 1875, sect. 9.)

Q. **To what Court are appeals from County Court decisions to be made?**

A. To a Divisional Court of the High Court of Justice, consisting of such judges thereof as may from time to time be assigned for that purpose, pursuant to Rules of Court, and the determination of such appeals by such Divisional Court is to be final unless special leave to go to the Court of Appeal shall be given by such Divisional Court. (Jud. Act, 1873, sect. 45).

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Upon the general principles, according to which damages are to be assessed in actions of contract, *Hadley* v. *Baxendale* (9 Ex. 341) still remains the leading authority, and furnishes the text for the discussion contained in the second chapter of Mr. Mayne's book. Properly understood and limited, the rule proposed in that case, although in one respect not very happily worded, is a sound one, and has been repeatedly approved both in England and America. Damages may, according to the judgment of the Court of Exchequer, be recovered if they are such as "may fairly and reasonably be considered as arising either naturally, *i.e.*, according to the usual course of things from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." There is no difficulty as to the first alternative in principle, although sometimes it may not be very easy to estimate the amount of damage. But the second alternative has given rise to much discussion, and it may be doubted whether the rule so expressed is of much service; for, generally speaking, parties contemplate the performance and not the violation of their contracts. The class of cases which it is intended to cover is that in which a contract is made under special circumstances, and damages which would not arise in the usual course of things from a breach do arise from those circumstances. If such circumstances are not known to the party who breaks the contract, it is clear that he is not liable. If they are known, then, according to *Hadley* v. *Baxendale*, he would be liable, since the resulting damage must be held within his contemplation, and so, *in that case*, the natural consequence of the breach. This proposition, however, must now be taken with considerable modification. The subsequent decisions, which are concisely summarized by Mr. Mayne, have established that mere knowledge of special circumstances is not enough, unless it can be inferred from the whole transaction that the contractor consented to become liable to the extra damage. This limitation is obviously just, especially in the case of persons, such as common carriers, who have no option to refuse the contract. Mere knowledge on their part of special circumstances ought not, and, according to the *dicta* of the judges in the Exchequer Chamber in *Horne* v. *Midland Railway Company* (21 W. R. 481, L. R. 8 C. P. 131), would not involve the carrier in additional responsibility. Mr. Mayne's criticism of the numerous cases in which this matter has been considered leaves nothing to be desired, and the rules he deduces therefrom (pp. 32, 33) appear to us to exhaust the subject.

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